

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re TRINITY T., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MISTY M.,

Defendant and Appellant.

D048498

(Super. Ct. No. NJ012837B)

APPEAL from a judgment of the Superior Court of San Diego County, James
Laurer, Jr., Referee. Affirmed.

Misty M. appeals a judgment declaring her minor daughter Trinity T. a dependent
of the juvenile court under Welfare and Institutions Code section 300, subdivision (a)¹

¹ All statutory references are to the Welfare and Institutions Code unless otherwise
specified.

and removing Trinity from her custody under section 361, subdivision (c)(1). Misty contends the evidence is insufficient to support the court's jurisdictional and dispositional findings. She also contends the court erred by finding there were no reasonable means to protect Trinity without removing her from Misty's custody. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2006, the San Diego County Health and Human Services Agency (Agency) filed a petition in the juvenile court alleging one-month-old Trinity was at substantial risk of serious physical harm because Misty caused multiple rib fractures to Trinity's sibling, H.B., resulting in Misty's conviction of child abuse under Penal Code section 273a, subdivision (a). (§ 300, subd. (a).)

The ongoing dependency case involving H.B. caused the social workers concern for Trinity's safety. H.B. came to Agency's attention in February 2004, about a month after her birth, when Misty tested positive for ethanol and marijuana. H.B. has Down Syndrome and leukemia. Misty received little prenatal care while pregnant with H.B. and lacked parenting skills. She was not taking her prescribed medications for bipolar disorder. Agency offered Misty a voluntary services contract in H.B.'s case.

In May 2004, Agency learned H.B. had five broken ribs, each in a different stage of healing. The injuries occurred while H.B. was in Misty's care. Misty's explanation of the cause of H.B.'s rib fractures was inconsistent with the injuries. Agency removed H.B. from Misty's custody and offered her reunification services. Misty visited H.B. only once while H.B. was receiving chemotherapy for her cancer. After 12 months of services,

Misty had not reunified with H.B. The court terminated services and set a section 366.26 selection and implementation hearing for H.B.

Misty was incarcerated for several months following her child abuse conviction. She continued to deny responsibility for H.B.'s injuries, claiming she confessed because she was "brow beaten [and] harassed." As a condition of her probation, Misty enrolled in the KIVA drug rehabilitation program. She had a fight with another program participant and was asked to leave KIVA, but re-enrolled two weeks later. Misty did not contact her probation officer, and had not fully complied with the requirements of her probation.

In assessing the risk to Trinity, the social worker noted Misty had four child welfare referrals regarding H.B. Misty was sexually abused at age two and became a dependent of the juvenile court. She lived with her grandparents until she was 12 years old. She then lived on the streets or in various group homes until she became pregnant with H.B. at age 17. Misty did not graduate from high school and was unemployed. She was still married to H.B.'s father, Jesse B., but planned to divorce him. She identified Trinity's father as Bruce T. and said he was a good father. Misty told the social worker about Bruce's drug abuse and criminal history, stating he was on parole and currently was clean and sober. Bruce reported he had been incarcerated for drug possession. His drugs of choice were marijuana and methamphetamine, and he last smoked marijuana six months before. He was participating in drug treatment. Bruce also had convictions for auto theft and aggravated battery.

Misty had been exposed to drugs since she was seven years old. She claimed she had been clean and sober for two to three years, but could not provide the date of her

sobriety. She was working on step one of the 12-step program at KIVA but did not yet have a sponsor. Misty said she had done everything required of her to reunify with H.B. She said her circumstances had changed because she was older and because Trinity, unlike H.B., did not have health issues. Misty admitted that when she was pregnant with H.B., she was "messed up from drugs, in a bad relationship, had lots of stress," and did not know what she was doing. Since then, she had taken several parenting classes, had "grown a lot" and was ready to be a mother. She was willing to participate in services and knew she needed to complete her drug rehabilitation program.

The social worker recommended placing Trinity in the same foster home as H.B. The recommendation to remove Trinity from Misty's custody was based in part on Misty's unemployment and inability to provide housing for Trinity. The social worker stated: "The parents are currently experiencing their first possible successful attempt at drug treatment in order to address the symptoms of addiction. Without continued drug treatment for the parents they are most likely to return to substance abuse and subject their child to a risk of more serious harm." The social worker recommended reunification services for Misty because she had completed some of her case plan requirements in H.B.'s case and was actively participating in her drug rehabilitation program. In the social worker's opinion, Misty had matured since her last reunification effort, and was cooperative and cordial. The foster mother agreed Misty had made positive changes.

At a jurisdiction and disposition hearing, Misty submitted on the social worker's reports. The court sustained the allegations of the petition under section 300, subdivision (a), declared Trinity a dependent of the court, removed her from parental custody under

section 361, subdivision (c)(1) and placed her in foster care. By clear and convincing evidence, the court found reasonable efforts had been made to prevent or eliminate the need for Trinity's removal from Misty's custody. The court ordered Misty to participate in reunification services, including enrolling in the Substance Abuse Recovery Management System (SARMS) program and having supervised visits with Trinity.²

DISCUSSION

I

Misty contends the evidence is insufficient to support the court's jurisdictional order. She asserts her current circumstances did not create a substantial risk of serious physical harm to Trinity to justify juvenile court intervention under section 300, subdivision (a).

A

In reviewing the sufficiency of the evidence on appeal, we examine the entire record for substantial evidence to support the findings of the juvenile court. We do not evaluate the credibility of witnesses, attempt to resolve conflicts in the evidence, or determine where the weight of the evidence lies. Rather, we draw all reasonable inferences in support of the juvenile court's findings, view the record favorably to the juvenile court's order and affirm the order even if there is other evidence supporting a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Baby Boy L.*

² Misty moves to strike all or a portion of minor's letter brief on the ground it contains impermissible postjudgment evidence concerning Misty's current whereabouts. Because we have not considered this evidence in addressing the issues on appeal, we need not decide whether it violates the applicable rules of appellate procedure. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405.) We deny the motion to strike minor's letter brief.

(1994) 24 Cal.App.4th 596, 610.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Section 300, subdivision (a) provides a basis for juvenile court jurisdiction if a minor has suffered, or is at substantial risk of suffering, serious physical harm inflicted nonaccidentally by the parent. "For purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm." (§ 300, subd. (a).)

The evidence showed that while H.B. was in Misty's care under a voluntary services contract with Agency, she had five fractured ribs. Each fracture was in a different stage of healing, suggesting multiple injuries over a period of time. H.B.'s nonaccidental injuries were inconsistent with Misty's explanation of their cause and resulted in Misty's conviction of child abuse under Penal Code section 273a, subdivision (a). The evidence supports a finding there was a substantial risk of serious future injury to Trinity based on Misty's history of repeated inflictions of injuries on Trinity's sibling. (§ 300, subd. (a).)

The court's jurisdictional finding was further supported by substantial evidence of factors suggesting Trinity was at risk of serious physical harm. Although "the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial

risk of physical harm," evidence of past conduct may be probative of current conditions if there is some reason to believe the acts may continue in the future. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; cf. *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134-1135 [petition failed to state basis for jurisdiction under section 300, subdivision (b) based on single incident of slapping 13 year old where facts suggested no physical harm would reoccur]; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396 [no evidence supported a finding minor was at substantial risk of future serious physical harm based on parents' conduct of leaving minor with family friend who subsequently sexually abused her].) Misty continued to deny responsibility for H.B.'s injuries and had not fully complied with the conditions of her probation following her conviction for child abuse. Although Misty participated in reunification services in H.B.'s case and claimed she had done everything to reunify with H.B., she visited her only once during six months of chemotherapy treatments. As the court previously found, Misty had no relationship with H.B., permitting an inference she had acquired no parenting skills. Misty had a lengthy history of drug abuse, which she was just beginning to address through her participation in KIVA. As noted by the social worker, Misty would likely return to substance abuse and subject Trinity to a risk of serious harm if she did not continue drug treatment. The evidence showed Misty's level of self-awareness and sobriety at the time of the jurisdiction hearing was insufficient to prevent exposing Trinity to a risk of serious physical harm in the future. Substantial evidence supports the court's jurisdictional finding under section 300, subdivision (a).

II

Misty challenges the sufficiency of the evidence to support the court's dispositional order. She asserts there was no evidence of substantial danger to Trinity if she were returned to Misty's custody.

A

Before the court may order a child physically removed from a parent's custody, it must find, by clear and convincing evidence, the child would be at substantial risk of harm if returned home, and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1); *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) The jurisdictional findings constitute prima facie evidence that the child cannot safely remain in the home. (§ 361, subd. (c)(1).) The parent need not be dangerous and the child need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal. 4th 735, 748, fn. 6; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.) In determining whether removal is warranted, the court may consider the parent's past conduct as well as present circumstances. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) We review the court's dispositional findings to determine if they are supported by substantial evidence. (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1654.)

B

The court's removal order was based on findings Misty had repeatedly inflicted injuries on Trinity's sibling, placing Trinity at substantial risk of serious future injury if returned to Misty's custody. The evidence also showed Misty denied having caused H.B.'s injuries and did not visit H.B. throughout the reunification period, permitting an inference Misty lacked both the insight and ability to parent. At the time of the disposition hearing in Trinity's case, Misty had not fully complied with the requirements of her probation in the criminal case and had not yet resolved her drug problem. She was unemployed and had no housing for Trinity because she was in a residential drug treatment program. Although Misty claimed her circumstances had changed and she was ready to be a mother to Trinity, she also acknowledged she needed drug treatment and other services to prepare her for parenting Trinity. In the social worker's opinion, Misty was likely to relapse into substance abuse if she did not continue with drug treatment. The court was entitled to find the social worker's assessment credible and to doubt Misty's claim she was ready and able to safely parent Trinity at this time. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53; *In re Margarita D.* (1999) 72 Cal.App.4th 1288, 1295-1296.) Substantial evidence supports the court's finding Trinity would be at substantial risk of harm if returned to Misty's custody. (§ 361, subd. (c)(1).)

III

Misty contends the court erred by finding there were no reasonable means to protect Trinity without removing her from Misty's custody. She asserts she was drug free and more mature, had participated in services for H.B., and was ready to be a mother.

A

Before the court can remove a child from parental custody, it must find there are no reasonable means by which the child's physical health can be protected without removal. (§ 361, subd. (c)(1).) Although the court is required to consider alternatives to removal, it has broad discretion in making a dispositional order. (*Ibid.*)

B

The evidence showed Misty did not successfully complete services in H.B.'s dependency case or reunify with her, resulting in the setting of a selection and implementation hearing for H.B. Misty's sobriety was fairly recent, considering her lengthy history of drug abuse. She did not suggest Trinity could live with her in the residential drug treatment program she was required to complete. The absence of reasonable alternatives to removal, coupled with the identified risk Misty posed to Trinity, was sufficient to support a finding there were no reasonable means of protecting Trinity without removing her from Misty's custody.

Misty further contends the court erred by not expressly stating it had considered less drastic alternatives to removal of Trinity from her custody. However, when the juvenile court does not state the factual basis for an order, we may infer the basis from the evidence. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218-1219; *In re Corienna G.* (1989) 213 Cal.App.3d 73, 83.) If the evidence is sufficient to support the basis, the error is deemed harmless. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 171.) The evidence was sufficient to support the court's factual findings regarding the need for removal. Based on this evidence, we infer the court considered less drastic alternatives to removal, but found

there was a substantial risk of harm to Trinity if she remained in Misty's custody. Misty was not prejudiced by the absence of a more explicit finding. (*In re Jason L.*, *supra*, at pp. 1218-1219; *In re Basilio T.*, *supra*, at p. 171.)

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.